UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS (VIOLATION OF ARTICLE 103 OF THE THIRD GENEVA CONVENTION AND UNITED STATES GOVERNMENT REGULATIONS) 15 October 2004

1. Timeliness: This Motion is filed in a timely manner as per the Presiding Officer's Order.

2. Position on Motion: The Defense's Motion to dismiss should be denied.

3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(j) and 4(n) for the purposes of this motion.

4. Facts:

a. The Chief Prosecutor did not ask that counsel be appointed to the Accused for the limited purpose of negotiating a pre-trial agreement, but ". . . to advise Mr. Hamdan on how he might engage in pretrial discussions with a view towards resolving the allegations against him." See Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, attached.

b. On 23 February, the Legal Advisor to the Appointing Authority did send a reply to the Defense but, contrary to the Defense's misrepresentation, it did contain an explanation. See Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ, attached. It explained that the Accused was being held based on his status as an unlawful combatant (a basis unrelated to military commissions).

c. The "back of the stack" allegation is an absolute misrepresentation. CDR XXXX never said what LCDR Swift has quoted him as saying. CDR XXXX merely told LCDR Swift that he did not control the order of cases and that he did not know when he would be tried if a plea agreement were not reached.

d. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects;

murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

5. Legal Authority Cited:

a. The Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955).

b. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)

c. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003)

d. Rasul v. Bush, 124 S.Ct. 2686 (2004)

e. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)

f. Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985)

g. War Crimes Act of 1996, 18 U.S.C. § 2441

h. Johnson v. Eisentrager, 339 U.S. 763 (1950)

i. United States v. Noriega, 808 F.Supp. 791 (S.D. Fla. 1992)

j. United States v. Lindh, 212 F.Supp.2d 541 (E.D. Va. 2002)

k. Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002)

l. Dep't of the Navy v. Egan, 484 U.S. 518 (1988)

m. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948)

n. Kolovrat v. Oregon, 366 U.S. 187 (1961)

6. Discussion:

The Defense moves this commission to dismiss the charges against the Accused on speedy trial grounds pursuant to Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 6 U.S.T. 3315 (1955). The Defense's motion should be dismissed because the GPW are not self-executing and do not apply to al Qaida.

Article 103 of the GPW is not self-executing.

Federal law distinguishes "self-executing" international agreements from "non-self-executing" international agreements. An international agreement is "non-self-executing" in any of the following circumstances:

a. if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or

b. if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or

c. if implementing legislation is constitutionally required.

Restatement (Third) of Foreign Relations Law § 111(4) (1987). If a treaty is "non-self-executing" then it does not give individuals rights that they may enforce in a judicial proceeding. "Courts in the United States are bound to give effect to . . . international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation." Id. § 111 (3).

That the GPW is not self-executing is demonstrated in the text of the GPW, its legislative history, and case law. Indeed the GPW contains many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

> What discussion there is [in the text of the GPW] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inherent in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at Article 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries."

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th cir. 2003), vacated on other grounds, 124 S.Ct. 2686 (2004). See also Al Odeh v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, Rasul v. Bush, 124 S.Ct.

2686 (2004); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork J., concurring); Handel v. Artukovic, 601 F.Supp. 1421, 1424-1426 (C.D. Cal. 1985). The Fourth Circuit alluded to the fact that there was one area in which the contracting parties sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which the parties pledged to punish themselves by enacting domestic criminal legislation. GPW Article 129. Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, and other war crimes, but does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided individuals with private rights of action.

The legislative history of the GPW does not suggest otherwise. In fact, the Senate Report makes clear that the GPW is not self-executing. In the section titled "Provisions Relating To Execution Of The Conventions," the Report states that "the parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the contentions enumerated as grave breaches." S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as "an advance over the 1929 instruments which contained no corresponding provisions." Id.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in Johnson v. Eisentrager, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them could not invoke the Geneva Convention because:

> It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789. It should be noted that the Senate that ratified the 1949 GPW was operating post-Eisentrager, yet no mention was made of the new GPW or its implementing legislation creating an individually actionable right. Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that "the weight of world opinion," would "exercise a salutary restraint on otherwise unbridled actions." S. Exec. Rep. at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit's

conclusion in Hamdi that the GPW is not self-executing is undoubtedly correct. As such, the Accused's claim motion should be denied on those grounds.[1] [2]

The GPW does not apply to al Qaida.

Even if the GPW were self-executing, the Accused's motion should be denied because the President has declared that the GPW does not apply to al Qaida. See Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7, 2002), available at www.library.law.pace.edu/government/detainee_memos.html. This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains. See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). But even if it were, it would at least be entitled to substantial deference, see Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). The President's memorandum should be given deference by the Commission and the Accused's request to dismiss should be denied.

Conclusion.

The GPW is non-self-executing and provides no private exercisable right to the Accused. Similarly, 18 U.S.C. § 2441 provides no private right to the Accused. Therefore, the Defense's motion must be denied. However, even if the GPW did give an individual a right in a criminal trial, the Accused could not claim that right because the President has found that the GPW do not apply to him.

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[1] United States v. Lindh, 212 F.Supp.2d 541 (E.D. Va. 2002), although permitting the assertion of the GPW "as a defense to criminal prosecution," is not controlling in this instance because the Fourth Circuit, a superior court, in Hamdi subsequently held the GPW to be non-self-executing. Hamdi at 468. Moreover, the case of United States v. Noriega, 808 F.Supp. 791 (S.D. Fla. 1992), also offers nothing of substance to the issue. First, Noriega was an advisory opinion by a district court. Id. at 799. Second, Noreiga's reasoning was that the non-grave-breach articles of the GPW were self-executing specifically because the GPW did not call for implementing legislation. Id. at 797. Thus, by the very reasoning in Noreiga, Article 103 of the GPW, violation of which would be a grave breach, would not be self-executing as they require implementing legislation pursuant to the plain language of the treaty.

[2] Additionally, the argument that the United States has already implemented the GPW by way of AR 190-8 is spurious. First, the War Crimes Act of 1996, 18 U.S.C. § 2441, is Congress' implementation of the GPW and its legislative history says that. AR 190-8, on the other hand, was enacted to implement DoD Directive 2310.1. DoD Directive 2310.1 merely establishes the Department of Defense's policy with regard to observing the international law of war, including the GPW. The policy of an agency subordinate to the Chief Executive cannot seriously be posited to be the United State's implementing legislation to an international treaty when Congress, the United State's legislative body, was specifically charged with enabling legislation and actually did enact enabling legislation.

7. Attachments:

a. Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan

b. Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses:

a. Major XXXX
b. Captain XXXX
c. Special Agent XXXX (already Protected Information pursuant to Presiding Officer Order of August 27 2004).

We ask that the names contained in (a) and (b) above also be considered Protected Information. A proposed Protective Order has been provided in separate correspondence.

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Captain, U.S. Army
Prosecutor